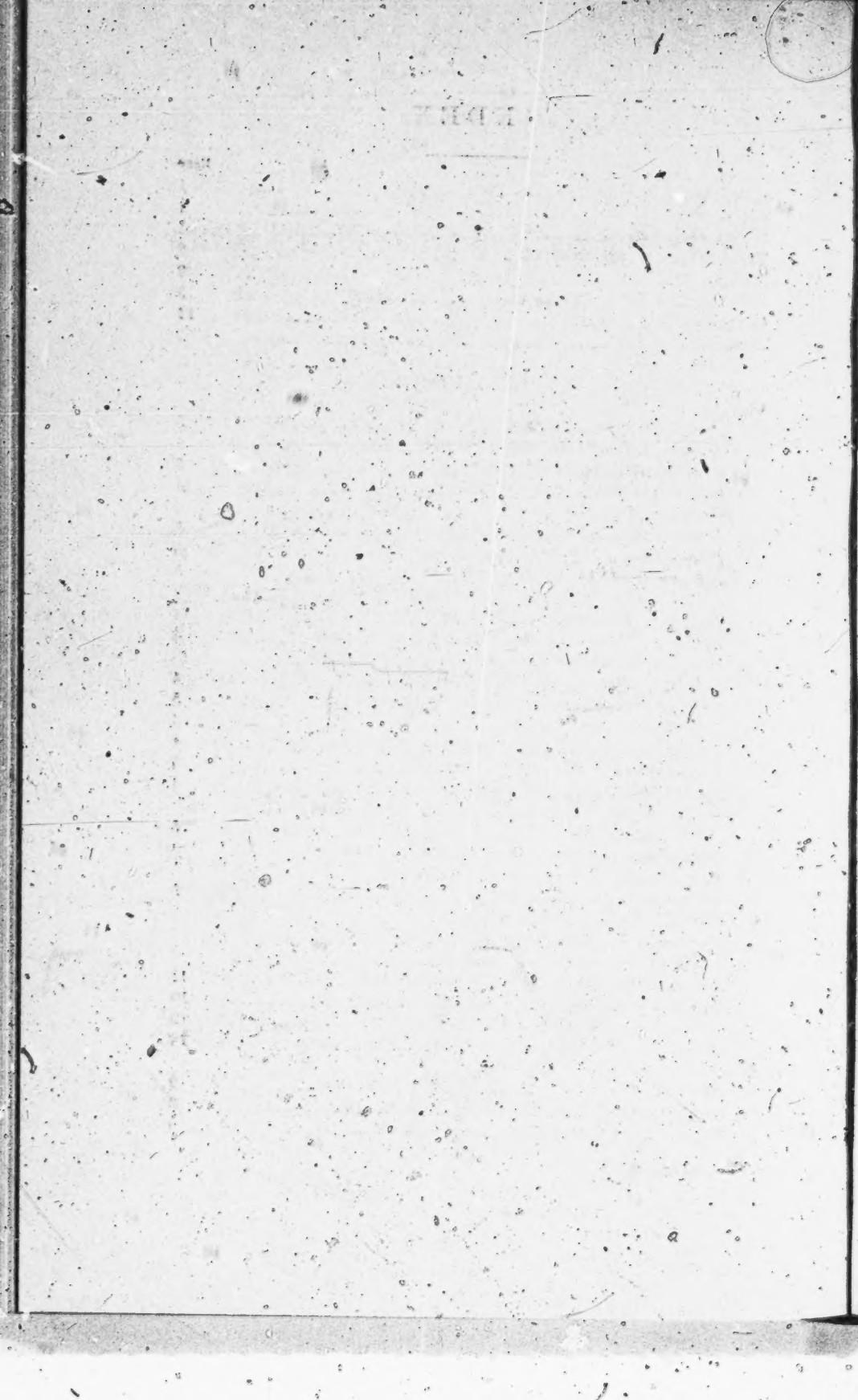


# INDEX

	Page
Opinions below .....	1
Jurisdiction .....	1
Questions presented .....	2
Treaty and statutes involved .....	2
Statement .....	2
Argument .....	3
Conclusion .....	11
Appendix .....	12

## CITATIONS

<b>Cases:</b>	
<i>Arizona v. California</i> , 293 U. S. 423 .....	5
<i>Arizona v. California</i> , 298 U. S. 558 .....	4
<i>Bunch v. Cole</i> , 263 U. S. 250 .....	5
<i>Carr v. United States</i> , 98 U. S. 433 .....	4
<i>Gibbons v. Ogden</i> , 9 Wheat. 1 .....	4
<i>Gibson v. Choueau</i> , 13 Wall. 92 .....	5
<i>Illinois Cent. R. Co. v. Chicago B. &amp; N. R. Co.</i> , 26 Fed. 477 .....	5
<i>Irvine v. Marshall</i> , 20 How. 558 .....	5
<i>James v. Dravo Contracting Co.</i> , 302 U. S. 134 .....	8
<i>Kansas v. United States</i> , 204 U. S. 331 .....	4
<i>Sanitary District v. United States</i> , 266 U. S. 405 .....	4
<i>Shell Petroleum Co. v. Town of Fairfax</i> , 180 Okla. 326 .....	8
<i>Stanley v. Schwalby</i> , 147 U. S. 508 .....	4
<i>Surplus Trading Co. v. Cook</i> , 281 U. S. 647 .....	5
<i>The Siren</i> , 7 Wall. 152 .....	4
<i>United States v. California</i> , 297 U. S. 175 .....	4
<i>United States v. Chicago</i> , 7 How. 185 .....	5
<i>United States v. Colvard</i> , 89 F. (2d) 312 .....	4
<i>United States v. Railroad Bridge Co.</i> , 6 McLean 517, Fed. Cas. No. 16, 114 .....	5
<i>Utah Power &amp; Light Co. v. United States</i> , 243 U. S. 389 .....	5
<i>Van Brocklin v. Tennessee</i> , 117 U. S. 151 .....	5
<i>Wilcox v. McConnel</i> , 13 Pet. 498 .....	5
<b>Constitution, Treaty, and Statutes:</b>	
Constitution, Article IV, Section 3, clause 2 .....	4
Constitution, Article VI, clause 2 .....	4
Treaty of September 30, 1854, 10 Stat. 1109 .....	12
Act of January 14, 1889, c. 24, 25 Stat. 642 .....	10
Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083 .....	12
Act of June 18, 1934, c. 576, 48 Stat. 984 .....	14
<b>Miscellaneous:</b>	
78 Cong. Rec. 10583, 11122-11139, 11724-11744 .....	9
House Report, 2049, 73d Cong., 2d Sess. ....	9
Senate Report, 1080, 73d Cong., 2d Sess. ....	9



In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 73

STATE OF MINNESOTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. Its judgment appears at R. 58-68. The opinion of the Circuit Court of Appeals (R. 84) is reported at 95 F. (2d) 468.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on March 12, 1938 (R. 92). Petition for certiorari was filed on May 31, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

(1)

**QUESTIONS PRESENTED**

1. Whether a State has power to condemn for a highway, without the consent of the United States, lands which the United States holds in trust for Indian allottees.
2. Whether the United States has consented to the condemnation, by a State, for a highway, of lands which the United States holds in trust for Indian allottees.

**TREATY AND STATUTES INVOLVED**

The treaty and statutes primarily involved are: Treaty of September 30, 1854 (10 Stat. 1109); Act of March 3, 1901 (31 Stat. 1058); Act of June 18, 1934 (48 Stat. 984). Relevant portions are set forth in the Appendix.

**STATEMENT**

The State of Minnesota filed a petition February 6, 1936, in a Minnesota district court for the condemnation of certain lands for highway purposes (R. 2). It appeared on the face of the petition that these lands were held in fee simple by the United States in trust for Indian allottees (R. 4-11). The United States removed the case to the Federal district court (R. 23-26). On the hearing of the case the State presented its petition and certain exhibits (R. 41-48) and moved for the allowance of its petition and for the appointment of appraisers (R. 48). There was no showing that the State had obtained the permission of the Secre-

tary of the Interior to build the highway across the Indian allotments. The United States appeared specially and moved that the action be dismissed because it was against the United States and the United States had not consented to it (R. 48).

The District Court denied the motion of the United States (R. 58) and granted the petition of the State (R. 59). On appeal by the United States the Circuit Court of Appeals for the Eighth Circuit reversed the judgment of the District Court with directions to dismiss (R. 92). It held that the State could not maintain this suit without the consent of the United States, and that the United States had not consented (R. 87-91).

#### **ARGUMENT**

1. The petitioner's contention that a State has power to condemn for a highway, without the consent of the United States, lands which the United States holds in trust for Indian allottees, presents a question already settled by this Court contrary to the petitioner's contention. The petitioner does not challenge the power of the United States to hold lands in trust for Indian allottees, or assert that lands so held are subject to state power to a greater extent than are other lands held by the United States, but argues generally that lands held by the United States "should be subject to the power of eminent domain of the State to the same extent as lands used for one public purpose may be acquired for another public or greater purpose."

where such added use would not be inconsistent with or defeat the first purpose." (Br. p. 40.)

The initial difficulty with this contention is the principle which bars any suit by a State to condemn property of the United States. A State cannot sue the United States. *Kansas v. United States*, 204 U. S. 331, 343; *Arizona v. California*, 298 U. S. 558, 568. And it is well settled that a suit against property of the United States is a suit against the United States, and so cannot be maintained. *The Siren*, 7 Wall. 152, 154; *Carr v. United States*, 98 U. S. 433, 437-439; *Stanley v. Schualby*, 147 U. S. 508, 512. Accordingly, in *United States v. Colvard*, 89 F. (2d) 312 (C. C. A. 4th) a decree condemning allotted Indian lands for purposes of a highway, where the permission of the Secretary of the Interior had not first been obtained, was held to give no title.

Apart from the problem of jurisdiction, petitioner's contention fails to take proper account of the principle, embodied in Article VI, clause 2, of the Constitution, and in such decisions of this Court as *Gibbons v. Ogden*, 9 Wheat. 1, 210, 211; *Sanitary District v. United States*, 266 U. S. 405, 425-426; and *United States v. California*, 297 U. S. 175, 183-184, that any exercise of state power, of whatever sort, must yield to a constitutional exercise of Federal power. It is answered specifically by the provision of the Constitution (Article IV, Section 3, clause 2) that Congress shall have power to dispose of and make all needful rules and regu-

lations respecting the property of the United States, and by the pronouncements of this Court that no State can affect the title of the United States or interfere with the disposal of its property. See *Utah Power & Light Co. v. United States*, 243 U. S. 389, 404-405; *Surplus Trading Co. v. Cook*, 281 U. S. 647, 650; *Irvine v. Marshall*, 20 How. 558, 563; *Gibson v. Chouteau*, 13 Wall. 92, 99; *Wilcox v. McConnel*, 13 Pet. 498, 517. Compare *Arizona v. California*, 283 U. S. 423, 464; *Bunch v. Cole*, 263 U. S. 250, 252. No purpose would be served by reaffirming what is already as clear as the explicit words of the Constitution and repeated decisions of this Court can make it.

Pefitioner relies on *United States v. Chicago*, 7 How. 185; *United States v. Railroad Bridge Co.*, 6 McLean 517, Fed. Cas. No. 16,114 (C. C. N. D. Ill.); and *Illinois Cent. R. Co. v. Chicago, B. & N. R. Co.*, 26 Fed. 477 (C. C. N. D. Ill.). The case first cited reserves the question, the second holds, and the third states in dictum that a State can condemn public lands of the United States which have not been set aside for a specific Federal purpose. This Court expressed a considerable doubt as to the correctness of that doctrine in *Van Brocklin v. Tennessee*, 117 U. S. 151, 161-162. In *Utah Power & Light Co. v. United States*, *supra*, these decisions were advanced as supporting the power of the State to condemn lands of the United States

(243 U. S. 389 at 393), but this Court replied (p. 404):

\* \* \* the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired.

However this may be, the lands sought to be condemned in this case have been reserved for a specific Federal purpose, and therefore could not be condemned even under the doctrine of the cases cited by petitioner.

2. Thus, petitioner can succeed only if it shows that the United States has consented to the condemnation action. The court below held that the United States has not consented. This decision presents no question of general importance and is not in conflict with that of any other Federal court.

a: As consenting to such condemnation the petitioner relies mainly upon paragraph 2 of Section 3 of the Act of March 3, 1901, *infra*, p. 13. That paragraph provides that lands allotted in severalty to Indians may be condemned in the same manner as land owned in fee, and that the money awarded shall be paid to the allottee. Paragraph 1 of Section 3 authorizes the Secretary of the Interior to grant rights of way for telegraph and telephone lines and offices through Indian reservations and

allotted Indian lands restricted as to alienation, provides that such lines shall not be constructed without the authority of the Secretary, and provides that the compensation to be paid to the Indians shall be determined as the Secretary may direct and shall be subject to his final approval. Section 4 of the Act authorizes the Secretary to grant permission, upon compliance with such requirements as he may deem necessary, for the opening of public highways through Indian reservations and allotted Indian lands restricted as to alienation.

The Circuit Court of Appeals held that paragraph 2 of Section 3, read in its context, merely prescribes the procedure to be followed in a suit for the condemnation of Indian lands after authority for the condemnation has been obtained from the Secretary of the Interior. This holding, it is submitted, is correct. Paragraph 2 of Section 3 is placed between paragraph 1 of Section 3 and Section 4, both dealing in detail with the acquisition, under authority of the Secretary, of rights of way for specific purposes (including highways) across Indian lands. It seems plain that paragraph 2, at least as respects the purposes specifically dealt with in Sections 3 and 4, does no more than to prescribe the procedure to be followed in a condemnation suit, if permission for such acquisition of land is granted by the Secretary, and to remove the bar to such procedure which would otherwise be found

in the fact that suit must be brought against the United States.<sup>1</sup>

Petitioner would construe the second paragraph of Section 3 to authorize condemnation of land for highway purposes without the permission of the Secretary, even though Section 4 in terms requires the permission of the Secretary "for the opening and establishment of public highways \* \* \*." This construction makes the statute self-contradictory. Indeed, petitioner views Section 4 as largely inoperative, since it states (Br. 21) that the Secretary's permission, although required under Section 4, is unnecessary "if agreement be impossible" because of the supposed power to condemn irrespective of the Secretary's authority.

Petitioner also emphasizes that paragraph 2 of Section 3 was added to the Act as an amendment to the original bill, but that, of course, does not mean that it is not to be read with the rest of the Act. Compare *James v. Dravo Contracting Co.*, 302 U. S. 134, 145.

*Shell Petroleum Co. v. Town of Fairfax*, 180 Okla. 326, 69 Pac. (2d) 649, strongly emphasized by the petitioner, interprets paragraph 2 as consenting to the condemnation of Indian allotments, but overlooks the interrelation of that paragraph with the other provisions of the Act. Although opposed

---

<sup>1</sup> Paragraph 2 was introduced on the floor of the Senate and has no explanatory legislative history. Petitioner quotes (Br. 19-20) the full discussion which led to its adoption.

to the decision below, the authority to remove into a Federal court is sufficient guaranty against any application in Oklahoma of a state doctrine contrary to the rule in the Federal courts.

Furthermore, the Act of 1901 was in this respect superseded by the Act of June 18, 1934, known as the Wheeler-Howard Act, *infra* p. 14. That Act terminated any immediate attempt of the United States to assimilate the Indians, and initiated a policy of encouraging their tribal life and independent development. Section 4 of the Act provides that except as therein provided no transfer of restricted Indian lands shall be made, except that with the approval of the Secretary of the Interior allotted lands may be transferred to the Indian tribe, and except that such lands shall descend or be devised in accordance with existing laws to any member of the tribe or any heirs of such member. Paragraph 2 of Section 3 of the Act provides that nothing therein shall restrict the granting or use of permits for easements or rights of way over the lands.<sup>2</sup> This Act impliedly repeals any consent in the Act of 1901 to condemnation by the States of allotted Indian lands: (1) The general purpose of the Act excludes any severance of the Indian holdings. (2) The literal meaning of Section 4 forbids

<sup>2</sup> The committee reports (S. Rept. 1080, H. Rept. 2049, 73d Cong., 2d Sess.) and the debates (78 Cong. Rec. 10583, 11129-11139, 11724-11744) throw no light on the interpretation of this provision.

all transfers of restricted lands. (3) Finally, the specific exceptions in Sections 3 and 4, to the prohibition of Section 4 against transfer of Indian lands, forbid any construction by which other exceptions would be permitted.

b. The petitioner contends also that the United States has consented to the condemnation of the lands sought in this case by the treaty between the United States and the Chippewa Indians of September 30, 1854, *infra*, p. 12. Article 3 of that treaty provides in part that:

All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

There are many reasons why this provision has no relevance to the present case: (1) The treaty provision related only to tribal lands, and did not authorize roads to be run through allotted lands; the machinery for allotment was first set up by the Act of January 14, 1889, c. 24, 25 Stat. 642. (2) If the treaty provision had application to allotted lands, it clearly was repealed by the Act of 1901, discussed above. Whatever interpretation be given that Act, it fully covers any acquisition of Indian lands for highways. (3) If the treaty provision had not theretofore been repealed by implication, it was repealed by the Wheeler-Howard Act, discussed above. (4) The treaty dealt with rights only as between the Chippewas and the United

States; it did not grant to the States or to private interests rights as against both.

CONCLUSION

The decision of the Court of Appeals presents no substantial question of general importance, is not in conflict with any other Federal decision, and is correct. Therefore, it is respectfully submitted that the petition should be denied.

ROBERT H. JACKSON,

*Solicitor General.*

CARL MCFARLAND,

*Assistant Attorney General.*

C. W. LEAPHART,

THOMAS E. HARRIS,

*Attorneys.*

JULY 1938.

## APPENDIX

Treaty of September 30, 1854, between the United States and the Chippewa Indians (10 Stat. 1109)—

ARTICLE 3. \* \* \* [the President] may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083—

SEC. 3. That the Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of

the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this Act: *Provided*, That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities.

That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

SEC. 4. That the Secretary of the Interior is hereby authorized to grant permission,

upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

Act of June 18, 1934 (Wheeler-Howard Act),  
c. 576, 48 Stat. 984—

SEC. 3.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes;

SEC. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member:

